IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JOHN KNOTT,

Plaintiff,

v. **Civil Action No.: 3:10-CV-82**

HSBC CARD SERVICES INC.,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO REMAND CASE

COMES NOW the Plaintiff, by and through her counsel, Kirk H. Bottner, Esquire and hereby replies to the Defendant's Response to Plaintiff's Motion to Remand, and in support hereof states as follows:

LEGAL STANDARD

Pursuant to 28 U.S.C. 1332(a), The district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between (1) Citizens of different States; (2) Citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States. Additionally, pursuant to 28 U.S.C. 1332(c)(1), a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

United States "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1). "Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." *Id.* § 1441(a). Generally, the party seeking removal bears the burden of showing that federal jurisdiction exists. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). Because removal jurisdiction is strictly construed, all doubt is resolved in favor of remand. *Id.*

For cases instituted in state court and removed, a strong presumption arises that the plaintiff has not claimed an amount large enough to confer jurisdiction on a federal court. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-90, 58 S. Ct. 586, 82 L. Ed. 845 (1938). Where a complaint does not request a specific amount of damages, courts may require a removing defendant to establish the jurisdictional amount. *Mullins v. Harry's Mobile Homes, Inc.*, 861 F. Supp. 22, 23 (S.D. W. Va. 1994) (Faber, J.). "In such circumstances, . . . the court may look to the entire record before it and make an independent evaluation as to whether or not the jurisdictional amount is in issue." *Id.* When "a defendant . . . removes a case from state court in which the damages sought are unspecified, asserting the existence of federal diversity jurisdiction, the defendant must prove by a preponderance of the evidence that the value of the matter in controversy exceeds the jurisdictional amount." *Landmark Corp. v. Apogee Coal Co.*, 945 F. Supp. 932, 935 (S.D. W. Va. 1996) (Copenhaver, J.). (When "[a] defendant . . . removes a case from state court in which the damages sought are unspecified, asserting the existence of federal jurisdiction, [the defendant] must prove by a preponderance of the evidence that the value of the matter in controversy exceeds the jurisdictional amount."); see *Adkins v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 43252, 15-16 (S.D. W. Va. May 3, 2010) (unpublished).

LEGAL ARGUMENT

The Defendant's entire arguments are premised upon the mistaken assertion that he Plaintiff's Complaint alleges a violation of the discharge injunction. In fact, Plaintiff's Complaint does not allege a violation of the discharge injunction. Therefore, Plaintiff's claims are not preempted by Federal Bankrutpcy Law. The Defendant completely mischaracterizes the facts and the claims alleged by the Plaintiff in his Complaint. A complete reading of the Complaint evidences that Plaintiff has only asserted two state causes of action, neither of which are for a violation of a discharge injunction. Plaintiff's claims are solely for illegal debt collection based upon the Defendant employing unfair and unconscionable means in an attempt to collect the debt by continually communicating directly with the Plaintiff despite knowing Plaintiff was represented by Counsel in violation of W. Va. Code § 46A-2-128(e); and 2) negligence, per se, based upon the Defendant's violation of a West Virginia Statute. Neither of these claims are preempted by Federal Bankruptcy law.

A. The Court does not have Subject Matter Jurisdiction Because Plaintiff's State Law Claims are Not Preempted by the Federal Bankruptcy Code.

The Defendant argues that where a state statute affects a party's rights or duties in a bankruptcy proceeding, or has an impermissible application as it relates to the Federal Bankruptcy Code, the Court must determine if the law is preempted by the Federal Bankruptcy Code. While, this is true, the statute in question in this case does not affect any party's rights or duties in a bankruptcy proceeding or have an impermissible application relating to the Federal Bankruptcy Code.

1. Plaintiff's State Law Claims are Not Preempted because the Federal Bankruptcy Code Does Not Regulate the Conduct Regulated by W. Va. Code § 46A-2-128(e).

A Defendant's alleged improper contact with the Debtor based on a State law that regulates how such contact is to be made when the debtor is represented by an attorney is not an area subject to preemption by the Bankruptcy Code because: (1) it is not an area regulated by Congress in the Bankruptcy Code; (2) it is possible to comply with both the Bankruptcy Code and §46A-2-128(e) in that the Bankruptcy code's focus is on whether a creditor has attempted to collect on a pre-petition debt while the focus of the State law is on the method by which a debt collector may make contact with a represented party, (3) §46A-2-128(e) does not attempt to affect bankruptcy related rights and remedies, and (4) nothing about the application of §46A-2-128(e) in this case impedes or impeded the Defendant's Federal bankruptcy rights. See the Memorandum Opinion in *Johnston v. Valley Credit Services, Inc. (In re Johnston)*, 2007 Bankr. LEXIS 1174, 13-14 (Bankr. N.D. W. Va. April 12, 2007) attached hereto and incorporated herein by reference as **Exhibit "A."** See also *Sturm v. Providian National Bank*, 242 B.R. 599, 602 (S.D. W. Va. 1999) (holding a violation of [W. Va. Code §46A-2-128(e)] is a state law claim not preempted by the Federal Bankruptcy Code).

In support of its position that Congress intended to provide the exclusive remedy for a violation of a discharge injunction and therefore the Plaintiffs claims are preempted, the Defendant relies upon *Frye v. Bank of America, N.A.*, 2010 U.S. Dist. LEXIS 83969 (N.D. W. Va. Aug. 16, 2010). However, the *Frye* Court clearly did not hold that W. Va. Code §46A-2-128(e) is preempted by the Federal Bankruptcy Code when it was clearly presented with the opportunity to do so. Instead, the Court only held that W. Va. Code §46A-2-127(d) was preempted by the Federal Bankruptcy Code. To the extent that the *Frye* Court held that W. Va. Code §46A-2-128(e) was preempted by the National Bank Act and a Code of Federal Regulation, those arguments have not been presented herein nor are they applicable to this case.

Furthermore, the Defendant's argument that Congress provided the exclusive remedy for a violation of the discharge injunction and therefore Plaintiff's claims are preempted has already been addressed by the United States Bankruptcy Court for the Southern District of West Virginia in *Sturm v. Providian National Bank*, 242 B.R. 599 (S.D. W. Va. 1999). In *Sturm*, the Defendant, like in this case, argues the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362, has been violated and, thus, the remedial provisions of the Bankruptcy Code should provide Plaintiff's sole remedy. Id., at 601. However, the *Sturm* Court stated that Congress intend that the Bankruptcy Code be so pervasive that it occupy the entire field of debtor/creditor relations and further that since there was no meaningful impediment to a creditor's pursuit of its federal bankruptcy rights if it is required to deal with a debtor's lawyer rather than the debtor, as required by West Virginia law, that W. Va. Code §46A-2-128(e) is not preempted by Federal Bankruptcy Law. Id., at 602.

Lastly, the Defendant's argument that Congress provided the exclusive remedy for a violation of the discharge injunction is inapplicable in this case because the Plaintiffs have not asserted a violation of the discharge injunction. Rather, the Plaintiffs asserted violations of W. Va. Code §46A-2-128(e) which regulates how such contact by a creditor is to be made when the debtor is represented by an attorney. The fact that the overall statute governs unfair and unconscionable debt collection practices does not negate that fact that the provision in question is not preempted by the Federal Bankruptcy Code.

2. W. Va. Code § 46A-2-128(e) is not Preempted Because it Creates a Cause of Action under State Law that does not exist under Federal Law.

As previously stated herein, Federal Bankruptcy Law does not govern alleged improper contact by a creditor with the Debtor or how such contact is to be made when the debtor is represented by an attorney. Therefore, the fact that the subject statute creates a private cause of action is inapposite. As such, the argument by the Defendant that Plaintiff's State Law claims creates a cause of action that does not exist under Federal Bankruptcy Law is severely misplaced.

Additionally, while the Federal Bankruptcy Code does not create a private cause of action for a violation of a discharge injunction, a debtor is entitled to bring his or her claims in the context of a civil contempt proceeding for failure of the creditor to abide by the terms of a Bankruptcy Court's Discharge Order and to seek punitive damages if appropriate based upon the circumstances. Finally, Plaintiff would note again that these arguments are inapplicable here because the Plaintiff has not alleged a violation of the discharge injunction and thus the State Law claims of the Plaintiff are not preempted.

B. Plaintiff's State Law Claims are Not Preempted by the Federal Bankruptcy Code and Plaintiff's Complaint Does Not Assert a Federal Question, Therefore Remand to State Court is Necessary.

As is more fully detailed hereinabove, Plaintiff's State Law Claims are not preempted by the Federal Bankruptcy Code. Moreover, Plaintiff's Complaint does not give rise to any question of Federal law. Accordingly, this Court lacks jurisdiction and this matter is appropriate for Remand to State Court.

CONCLUSION

WHEREFORE the Plaintiff, by and through his counsel, Kirk H. Bottner, Esquire, respectfully requests this Honorable Court remand this case back to the Circuit Court of Jefferson County, West Virginia; and for any such further relief as this Court may deem necessary and appropriate.

JOHN KNOTT
By Counsel

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CERTIFICATE OF SERVICE

I, Kirk H. Bottner, Esquire, counsel for the Petitioner herein, certify that I served a true copy of the foregoing **Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Remand Case** upon the following individual(s) via electronic notice through the CM/ECF system on this 7th day of September, 2010.

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